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# Supreme Court of the United States

October Term, 1998

JAMES P. BRADY, STEVEN O. RICHARDSON, JACK L. ADSIT a/k/a COMMITTEE OF SPONSORS OF CONGRESSIONAL TERM LIMITS REFORM 1996, and JEREMY A.C. WEISSEL, STEPHANIE M. JACOBS, and DEWEY C. HERNANDEZ,

*Petitioners,*

v.

DIANA J. OHMAN, SECRETARY OF STATE FOR THE STATE OF WYOMING,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a state may count a voter's abstention from voting on an initiative or referendum measure in a general election as a "NO" vote.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners James P. Brady, Steven O. Richardson, Jack L. Adsit a/k/a Committee of Sponsors of Congressional Term Limits Reform 1996, and Jeremy A.C. Weissel, Stephanie M. Jacobs, and Dewey C. Hernandez respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit entered on July 15, 1998.

## OPINIONS AND ORDERS BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit in the original action below is not reported. It is unpublished. *Brady, et al. v. Ohman,* No. 97-8081 (10th Cir. July 15, 1998). A copy of the Order and Judgment is reproduced in the Appendix at App. 1.

The ruling of the District Court for the District of Wyoming in the original action below was a telephonic oral ruling. *James P. Brady, et al. v. Ohman,* No. 97-CV-016-D (D.Wyo. July 9, 1997). A copy of the transcript of the telephonic oral ruling, together with a copy of the district court's order and judgment are reproduced in the Appendix beginning at App. 12.

## JURISDICTION OF THIS COURT

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit was entered on July 15,

1998. This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

Article III, section 52(f) of the Wyoming State Constitution provides in relevant part:

> If votes in an amount in excess of fifty percent (50%) of those voting in the general election are cast in favor of adoption of an initiated measure, the measure is enacted. If votes in an amount in excess of fifty percent (50%) of those voted in the general election are cast in favor of rejection of an act referred, it is rejected. . . .

## STATEMENT OF THE CASE

### A. Procedural History and Basis of Jurisdiction

Petitioners filed a Complaint in the District Court for the District of Wyoming invoking the court's jurisdiction under 28 U.S.C. § 1331, seeking a declaratory judgment that Article III, section 52(f) of Wyoming's Constitution was unconstitutional under both the Equal Protection Clause of the Fourteenth Amendment and the First Amendment of the United States Constitution. Petitioners also alleged that their Civil Rights under 42 U.S.C. § 1983 had been violated.

The district court judge granted the Defendant's (Respondent Ohman) motion for summary judgment finding that Article III, section 52(f) of Wyoming's Constitution did not violate the Petitioners' equal protection or

voting rights as secured by the United States Constitution. App. at 21 and 23.

Pursuant to 28 U.S.C. § 1291, Petitioners appealed the district court's ruling and order to the United States Court of Appeals for the Tenth Circuit. On July 15, 1998, the Tenth Circuit Court of Appeals issued an unpublished Order and Judgment affirming the district court's judgment in favor of the Defendant (Respondent Ohman). App. at 1. This timely Petition for a Writ of Certiorari follows.

**B. The Parties**

Petitioners James P. Brady, Steven O. Richardson, and Jack L. Adsit comprise the Committee of Sponsors of Congressional Term Limits Reform 1996. The Committee of Sponsors of Congressional Term Limits Reform 1996 is an unincorporated group that sponsored both an initiative and a referendum that were placed on the ballot in the general election of 1996 in Wyoming.

Petitioners Jeremy A.C. Weissel, Stephanie M. Jacobs, and Dewey C. Hernandez are citizens, residents, taxpayers, and registered voters in Wyoming. In voting in the general election in 1996, these Petitioners consciously chose to "abstain" from voting on both the initiative and referendum sponsored by the Petitioners' Committee of Sponsors of Congressional Term Limits Reform 1996. Their abstentions were counted as "No" votes by the State of Wyoming when tabulating the votes required for passage of the Petitioners' Committee of Sponsors of

Congressional Term Limits Reform 1996's proposed initiative and the separate referendum.

Respondent Ohman is the Secretary of State for Wyoming. Respondent Ohman, as the Secretary of State, relying on section 52(f) of Article III of Wyoming's Constitution, declared that Petitioners' Committee of Sponsors of Congressional Term Limits Reform 1996's proposed initiative and the separate referendum failed to receive the required majority of votes cast in the general election in 1996. Therefore, both measures failed to pass.

### C. Material Facts

In the November, 1996 general election, the voters of Wyoming had the opportunity to vote on an initiative regarding Congressional candidates and a separate referendum regarding term limits for certain elected state officials. Both were sponsored by Petitioners James P. Brady, Steven O. Richardson, and Jack L. Adsit, a/k/a Committee of Sponsors of Congressional Term Limits Reform 1996.

Petitioners Jeremy A.C. Weissel, Stephanie M. Jacobs, and Dewey C. Hernandez voted in the 1996 general election in Wyoming; however, they chose not to vote on the proposed initiative or referendum sponsored by the Petitioners James P. Brady, Steven O. Richardson, and Jack L. Adsit. Their decision to abstain from voting resulted in their non-vote being counted as a "No" vote by the State of Wyoming.

Even though a majority of the voters who voted on the proposed initiative and the separate referendum cast

ballots in favor of each of these measures, the Respondent, Secretary Ohman, declared that both measures failed because neither one received a majority of the total votes cast in the entire general election, not just a majority of those votes cast on each particular measure. Each measure received a majority of votes cast on that particular measure. However, each voter who abstained from voting on either the initiative and/or the referendum had that abstention counted against passage.

In Wyoming, the people may propose and enact laws via the initiative, and they may approve or reject laws enacted by the state legislature via the referendum. *See* Wyo. Const. art. III, § 52(a). If an initiative measure is approved, it is not subject to the veto power, and it may not be repealed by the state legislature within two years of its effective date. However, the approved measure is subject to amendment at any time. *See* Wyo. Const. art. III, § 52(f).

## REASONS FOR GRANTING THE WRIT

This Honorable Court should grant certiorari in this case because it presents a unique but fundamental question of federal constitutional law involving this Court's "one man, one vote" principle. This Court has upheld "supermajority" vote requirements, *see Gordon v. Lance*, 403 U.S. 1 (1971), and has allowed government to restrict who may vote in certain elections. *See Salyer Land Co. v. Tulare Water District*, 410 U.S. 719 (1973). However, this Court has never addressed whether a State may count a voter's abstention as a "no" vote.

Significantly, in a case raising questions involving the most basic fundamental rights,[1] the Tenth Circuit Court of Appeals cited no authority as the basis for its Order and Judgment. As a result of the court's decision below, Wyoming voters who wish to vote for the Presidential, Vice-Presidential, and other federal candidates, but who choose not to vote on an initiative and/or referendum are forced into one of two choices. The voters can either surrender their right to vote in the federal election and have their acquiescence not counted against the ballot measure, **or** they can vote in the federal election for candidates and have their abstention on the initiative and/or referendum used to count against passage of that measure. The only way a voter in Wyoming can choose not to vote on a ballot measure is by surrendering their right to vote at all in the general election. This is the consequence of Wyoming's vote counting scheme.

## ARGUMENT

In *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), this Court stated that the right to vote is "a fundamental political right, because preservative of all rights." Indeed,

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[1] In *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964), this Court recognized that

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

this Court explained that "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The Tenth Circuit Court of Appeals' decision affirming the district court has the effect, whether intended or not, of "undermining" and eliminating a person's right not to vote in an election.

In addition, the Tenth Circuit's decision allowing the State of Wyoming to count abstention votes as "No" votes dilutes the voting strength of those persons who actually vote "Yes" on a measure. An individual's "Yes" vote is negated not only by the "No" votes of those individuals who actually vote "No" on their ballot, but also by those ballots on which nothing is marked for that particular ballot question. Therefore, not only does the state violate the rights of those voters who abstain from voting, but it also violates the equal protection rights of those voters who actually vote on the particular question.

This Honorable Court has upheld "supermajority" vote requirements for referendums, *Gordon v. Lance*, 403 U.S. 1 (1971), and selective franchise provisions in certain, very narrow circumstances, *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719 (1973). However, this Court has never addressed the issue that this case presents to the Court.

A simple example reveals how the Wyoming scheme in section 52(f) works. If 100,000 people vote in a general election, and only 50,000 people actually vote on the proposed measure by marking "Yes" on the ballot, under section 52(f) of Wyoming's Constitution, the measure still fails because the 50,000 voters who abstained from voting

on the measure are deemed by Wyoming as having voted "No." Despite a ratio of 100% in favor to 0% voting against, the measure fails because it does not receive favorable votes in an amount in excess of the fifty percent (50%) of all 100,000 who voted in the general election. Even though the measure satisfies a supermajority vote requirement, which this Court has upheld, it still fails under section 52(f).

Similarly, if a simple majority of Wyoming's legislators pass a bill, the citizens can seek to refer the bill to the people. If they do so, the referred measure is allowed into law unless a majority of voters casting ballots at the polls in the general election affirmatively vote against it. *See* Wyo. Const. art. III, § 52(f).

Wyoming's voting requirement prevents abstentions. Both abstentions and "No" votes are counted by Wyoming as "No" votes against the "Yes" votes. This voting scheme violates the principles of "one person, one vote."

## A. BACKGROUND

The State of Wyoming requires that there must be votes in excess of fifty percent (50%) of all of the votes cast in the general election in favor of either enacting the initiated measure or rejecting the act referred. *See* Wyo. Const. art. III, § 52(f). Other states also have similar vote counting schemes for proposing and ratifying state constitutional amendments.[2]

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[2] Other states also have special vote counting schemes for proposing and ratifying state constitutional amendments. *See*

Rather than calculating whether an initiative or referendum has passed based on a majority or supermajority of those persons who actually vote on the particular measure, Wyoming determines the passage of a measure by considering the votes cast on a measure against the total number of votes cast in the general election. Thus, for example, in Wyoming's general election in 1996, 215,844 votes were cast. Of that total amount, 105,093 (54%) votes were cast in favor of the Petitioners' initiative while 89,018 were cast against it. With respect to the votes cast on the referendum that appeared on the ballot in 1996, 104,544 votes were cast in favor of the referendum

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HAWAII Const. art. XVII, § 2 and § 3 – Amendments proposed by constitutional convention or by the state legislature must be ratified at a general election

> by a majority of all the votes tallied upon the question, this majority constituting at least fifty per cent of the total votes cast at the election, or at a special election by a majority of all the votes tallied upon the question, this majority constituting at least thirty per cent of the total number of registered voters.

*See also* ILLINOIS Const. art. XIV, § 2(b) which provides in part that amendments proposed by the Illinois General Assembly shall be voted on a **separate ballot** and must be approved by either three-fifths of those voting on the amendment or a majority of those who voted in the election; MINNESOTA Const. art. IX, § 1 provides in part, "If a majority of all the electors voting at the election vote to ratify an amendment, it becomes a part of this constitution;" and NEW MEXICO Const. art. XIX, § 1 which provides, in part, that amendment of Article VII, § 1 and § 3, and amendment of Article XII, § 8 and § 10 requires three-fourths of the voters voting on the amendment to vote in favor of it.

while only 90,138 were cast against passage of the referendum. *See* App. at 15.

Despite receiving a majority of "Yes" votes, Respondent Ohman declared that the initiative and referendum failed because they did not receive a majority of "Yes" votes based on the total number of votes cast in that election, not just those votes cast on that specific initiative and referendum question. Respondent Ohman relied on Article III, section 52(f) of Wyoming's Constitution.

## B. THE COURT'S DECISION BELOW IMPLICATES THIS COURT'S DECISIONS REGARDING THE FIRST AMENDMENT'S RIGHT TO SPEAK AND VOTE.

By affirming the district court, the Tenth Circuit granted Wyoming the power to count a voter's abstention on a particular question as a "No" vote. Besides violating the voters' equal protection rights, this ruling violates the First Amendment by allowing Wyoming to deprive the people of their right to abstain on an issue.

This Court and other courts have recognized that voting implicates the right to speak under the First Amendment.[3] Therefore, Wyoming cannot compel an

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[3] *See Rosario v. Rockefeller*, 410 U.S. 752, 769-70 (1973), Justice Powell, in his dissenting opinion, stated that voting "was designed to serve" "the fundamental rights of personal choice and expression. . . . " Justice Douglas explained earlier, that "The rights of expression and assembly may be 'illusory if the right to vote is undermined.' " *Williams v. Rhodes*, 393 U.S. 23, 38-39 (1968) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). *See also Graves v. McElderry*, 946 F.Supp. 1569 (W.D.Okla. 1996)

individual to speak on a political issue simply because the individual decides to vote on certain matters and voluntarily chooses to abstain on a particular matter.

Currently, under section 52(f), voters in Wyoming, during a general election, are **compelled** to vote on a proposed measure even though they do not want to vote simply because they are exercising their right to vote on other matters, such as for federal candidates. If voters do not want to influence the vote for a ballot measure, however, they must surrender their right to vote altogether. In either situation, a voter's rights of free expression and voting under the First Amendment are violated.

This Court explained in *Burdick v. Takushi*, 504 U.S. 428, 438 (1992), that "Reasonable regulation of elections **does not** require voters to espouse positions that they do not support . . . " (emphasis provided). Yet, Article III, section 52(f) of Wyoming's Constitution does exactly that. An effect of section 52(f)'s vote requirement for initiatives and referendums is that it forces those voters who knowingly abstain from a ballot measure to vote "No" on the measure, even though those voters have decided to not "espouse a position" on the issue.

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("Thus, the manner and means a state decides to utilize to allow citizens to cast their vote on an election form **directly implicates the citizens' rights of free speech and association under the First Amendment.**") (emphasis added).

This Court has ruled that "compelled" speech is unconstitutional.[4] Because voting is a form of expression, Wyoming violates this Court's principle by compelling its voters to speak on a public issue when certain voters have knowingly decided to remain neutral. Wyoming does so by counting an abstention as a "No" vote under section 52(f).

In *Wooley v. Maynard*, 430 U.S. 701 (1977) this Court struck down a New Hampshire statute that criminalized covering that state's motto on license plates. This Court stated,

> the State may not constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.

*Wooley v. Maynard*, 430 U.S. at 713. Furthermore, this Court explained that "The right to speak and the **right to refrain from speaking** are complementary components of the broader concept of 'individual freedom of mind.' " *Id.* at 714 (citing *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 633-34 (1943)) (emphasis added).

In *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court struck down the West Virginia Board of Education's requirement that schoolchildren

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[4] *See Glickman v. Wileman Bros. & Elliott*, 117 S.Ct. 2130 (1997), *rehr'g denied*, 118 S.Ct. 25 (1997); *Abood v. City of Detroit Board of Education*, 431 U.S. 209 (1977); *Wooley v. Maynard*, 430 U.S. 701 (1977); and *West Virginia Board of Education v. Barnette*, 319 U.S 623 (1943).

salute the flag and say the pledge of allegiance. The Court concluded that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word **or act** their faith therein." *Id.* at 642.

Both of these cases involved this Court striking down a state's requirement that persons engage in expression. The district court below, in the case at bar, refused to apply these cases' holdings because the Petitioners were not forced to **publicly** express their allegiance, opinion or vote. *See* App. at 22. Regardless, however, of the fact that voters in Wyoming are not required to "publicly" announce how they voted or did not vote, Wyoming still forces them to speak when they choose otherwise. The fact that voters are not required to publicly announce their vote is unimportant. The key fact is that their **abstention** results in a "No" vote. Such a result is not only inaccurate but also compelled speech. *See West Virginia Board of Education v. Barnette*, 319 U.S. at 642. This contravenes what this Honorable Court has held regarding the fundamental rights of speaking and voting under the First Amendment.

### C. THIS COURT'S "ONE MAN, ONE VOTE" PRINCIPLE IS NEGATED BY WYOMING'S VOTING SCHEME FOR INITIATIVES AND REFERENDUMS.

This Court noted in *Gray v. Sanders*, 372 U.S. 368 (1963), that an underlying principle in many of the Court's decisions is that each voter is equal to every other voter when casting a ballot. This principle of political

equality means "one person, one vote." *Id.* at 380. Indeed, "Every voter's vote is entitled to be counted once. **It must be correctly counted and reported.**" *Id.* (emphasis added). A person's abstention vote in Wyoming is not "correctly counted and reported" when it is counted by the state against passage of an initiative. Such counting violates this Court's principle of "one man, one vote" and the Equal Protection Clause of the Fourteenth Amendment.[5]

In one of this Court's opinions regarding the "one man, one vote" principle, *Moore v. Ogilvie*, 394 U.S. 814 (1969), independent candidates for the offices of electors of President and Vice-President challenged an Illinois statute that required such candidates to collect at least 25,000 signatures from electors in the State on their nominating petitions. Of those 25,000 signatures, the State of Illinois required at least 200 signatures of qualified voters from at least fifty (50) counties in the state.

Acknowledging that "**All procedures used by a State as an integral part of the election process** must pass muster against the charges of discrimination or of the abridgment of the right to vote," *id.* at 818 (citing *United States v. Classic*, 313 U.S. 299, 314-18 (1941); *Smith v. Allwright*, 321 U.S. 649, 664 (1944)), this Court struck down the Illinois statute stating that it

> applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike,

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[5] The principle of "one man, one vote" from *Reynolds v. Sims*, 377 U.S. 533 (1964) was extended by this Court to apply to units of local government in *Avery v. Midland County*, 390 U.S. 474, 478-79 (1968).

> contrary to the constitutional theme of equality among citizens in the exercise of their political rights. **The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.**

*Id.* at 818-19 (emphasis added).

In *Moore v. Ogilvie,* this Court noted that nominating petitions used by independent candidates to secure a place on the election ballot is an "integral part" of Illinois' election system. *Id.* at 818. Wyoming's vote counting scheme for initiatives and referendums in section 52(f) is also an "integral part" of Wyoming's electoral process. Indeed, it does more than simply determine whether a person's name will be placed on the ballot. It determines whether or not a ballot question becomes the law in the State of Wyoming.

This Court, in *Moore v. Ogilvie,* rejected the argument that an Illinois statute was designed to ensure statewide support for the creation of a new political party. *Id.* at 818. Instead, this Court found the statute to be rigid and arbitrary. *Id.*

In its Order and Judgment, the Tenth Circuit Court of Appeals stated that

> . . . we believe the State of Wyoming has a legitimate and reasonable interest in seeing that an initiated measure, for example, is not enacted into law unless it is approved by a majority of those voting in the general election in which the initiated measure is being considered. If Wyoming wants to make it 'harder,' rather than 'easier,' to make laws by the initiated process, such

> is its prerogative, and, in our view, does not violate the First Amendment.

App. at 7 and 8. However, does Wyoming's interest in ensuring that an initiative or referendum has adequate "support" to become the law in the state include its "prerogative" to literally cast a "No" vote for all of the people who exercised their right to vote in a general election but who **abstained** from voting on the proposed initiative or referendum and to effectively allow a law adopted by the legislature to become law unless rejected by a majority of ballots cast? Wyoming's scheme not only makes it harder for the people to enact laws, but also makes it harder for them to reject legislative laws.

While this Court has upheld more than a supermajority vote requirement, Article III, section 52(f) of Wyoming's Constitution goes beyond requiring a "supermajority" vote for passing a proposed initiative or rejecting a referred law. It forces people to either vote in an election or not to vote in an election in order to not have their decision to not vote on a particular question counted. This Court has never addressed this issue in any prior decision.

In the only case the Tenth Circuit Court of Appeals mentions in its Order and Judgment, the case the district court relied on in rendering its decision, *Gordon v. Lance*, 403 U.S. 1 (1971), the plaintiffs challenged, under the Equal Protection Clause of the Fourteenth Amendment, the validity of a West Virginia constitutional provision that required a sixty percent (60%) approval vote in elections held for authorizing the local tax levying body to increase tax levies that went beyond those levies allowed

under the state's Tax Limitation Amendment. They also challenged a three-fifths (3/5) vote requirement in elections held by political subdivisions of the state regarding whether bond indebtedness should be incurred. *Lance v. Board of Education of County of Roane, W.Va.*, 170 S.E.2d 783, 784-85; 153 W.Va. 559 (1969), *rev'd sub nom. Gordon v. Lance*, 403 U.S. 1 (1971).[6]

Unlike the application of section 52(f) in a general election, the challenged constitutional and statutory provisions in *Gordon v. Lance* were applied in a "special election" held by the County Board of Education. *Lance v. Board of Education of County of Roane, W.Va.*, 170 S.E.2d at 785. Moreover, at this "special" election, separate ballots were submitted to the voters on two separate issues. On one ballot, the voters were asked to vote on one proposal regarding issuing general obligation bonds for building and repairing educational facilities. On a second ballot, voters were asked to permit the Board of Education to levy more taxes to support the current expenses and capital improvements. *Gordon v. Lance*, 403 U.S. 1, 3 (1971).

In that instance, the voters of the particular subdivision holding the "special" election were voting on two

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[6] This Court noted at the end of its opinion that West Virginia's constitutional and statutory vote requirement for incurring additional debt did not violate either the Equal Protection Clause or any other provision of the Constitution. *Gordon v. Lance*, 403 U.S. at 8. This court also explained that it did not express any views regarding the constitutionality of provisions that required either unanimity or gave a small group veto power, or whether a State could constitutionally require extraordinary majorities for electing public officials. *Id.* at n.6.

specific issues contained in two separate ballots. They would not be precluded from voting for candidates or on other issues because of the threat that their decision to abstain from voting on either or both specific issues involved in the "special" election would result in their abstention being counted as a "No" vote.

Indeed, in their Opening Brief to the Tenth Circuit Court of Appeals, Petitioners suggested that if Wyoming's concern is with ensuring that a proposed initiative has adequate support before being enacted, Wyoming simply could have two separate ballots at the elections. One ballot could be for all of the candidate races, and separate ballots could be used exclusively for ballot measures. By using separate ballots, the State of Wyoming does not interfere with an individual's decision to vote or not to vote. Individuals decide for themselves whether to request the separate ballot containing the proposed ballot measure(s). Whether they actually mark a "Yes" or "No" on that ballot becomes irrelevant because it is the act of voluntarily deciding to take that proposed measure ballot that is relevant.

Petitioners do not dispute that "supermajority" voting requirements are constitutional. *Gordon v. Lance*, 403 U.S. 1 (1971). Indeed, as the Court pointed out in *Gordon v. Lance*, the federal Constitution contains provisions that require more than a simple majority vote.[7] *Id.* at 6. However, Wyoming's vote counting scheme for initiatives and

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[7] *See* U.S. Const. art. I, § 3, cl. 6 (vote for impeachment conviction by the Senate is "Concurrence of 2/3 of the members present"); U.S. Const. art. I, § 5, cl. 2 (each House may expel a member, but it needs 2/3 concurrence); U.S. Const. art. I, § 7, cls. 2 and 3 (need 2/3 of each House to pass over a President's veto);

referenda in section 52(f) is **not** a "supermajority" requirement. Registered voters who choose not to vote at all in an election are not considered in the tabulation of votes, and a simple majority of voters can pass an initiative if all who vote in the general election also vote on the measure. Article III, section 52(f) allows the State of Wyoming to vote for the people who abstain and count those abstentions with actual "No" votes against the "Yes" votes. This Court has upheld voting restrictions as long as the "classification of voters into 'interested' and 'non-interested' groups [was] . . . reasonably precise." *Town of Lockport v. Citizens for Community Action at the Local Level*, 430 U.S. 259, 260 (1977) (citing *Kramer v. Union School District*, 395 U.S. 621 (1969)). This Court has stated, "the validity of the classification depended upon whether the group interests were sufficiently different to justify total or partial withholding of the electoral franchise from one of them." *Id.* at 267.

In the case before this Court seeking a Writ of Certiorari, however, the State of Wyoming has not classified voters in a way that prevents one group of voters from voting and not another. Instead, the state has cast a vote for that group of voters who consciously chose to abstain

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U.S. Const. art. II, § 2, cl. 2 (while a President has the power to make treaties, he/she needs consent of $^2/_3$ of the Senators present); U.S. Const. art. V (need $^2/_3$ of both Houses to propose amendments; $^2/_3$ of state legislatures to propose amendments; $^3/_4$ of state legislatures or $^3/_4$ of state conventions to ratify an amendment); U.S. Const. amend. XII (person having the greatest number of votes for President is the President provided the number is a majority of the whole number of Electors appointed).

rather than vote on a proposed initiative. Wyoming, therefore, treats those voters who actually cast a "Yes" vote differently than those voters who actually cast a "No" vote by strengthening the value of the "No" vote when it adds the abstention vote to the total "No" votes cast. Contrary to this Court's pronouncements that classifications between voters must be "reasonably precise" and group interests "sufficiently different," *id.* at 266, 267, the interests of voters who vote "Yes" for a measure and the interests of voters who actually vote "No" for a measure are not "sufficiently" different so as to support the greater influence that the "No" votes have on the passage or failure of a proposed initiative. *Id.* at 266. The passage or failure of a proposed statewide initiative will affect all of Wyoming's citizens.

In *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719 (1973), this Court repeated its test for state provisions that deny the right to vote to certain persons:

> 'Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise.'

*Id.* at 736 (quoting *Phoenix v. Kolodziejski*, 399 U.S. 204, 209 (1970)). Although Wyoming does not preclude anyone from voting who is entitled to vote, section 52(f) has the actual effect of weighing votes for proposed ballot measures differently, favoring those votes cast against a measure.

In Wyoming, all of the people are affected by the passage or failure of a proposed initiative or referendum.

Under the test quoted above, therefore, Wyoming may not constitutionally weigh any votes differently. Yet, by counting abstention votes as "No" votes and including them with the "No" votes against the "Yes" votes, the state lowers the value of a "Yes" vote against an actual "No" vote. Furthermore, Wyoming goes even further than excluding persons from voting. Wyoming forces people to cast votes when they choose otherwise.

A majority vote requirement based on the number of votes cast on a referendum issue by separate majorities of two groups of voters has been deemed by this Court to be constitutional. *Town of Lockport v. Citizens for Community Action*, 430 U.S. at 260-61, n.1 and 272-73. However, the question of whether or not abstention votes could be counted as "No" votes has not been decided by this Court.

## CONCLUSION

This Court has upheld supermajority vote requirements, and it has also upheld selective franchise restrictions in very limited circumstances. However, the case here on Petition seeking a Writ of Certiorari asks this Court to consider a State's vote counting scheme – a scheme that goes beyond simply a supermajority requirement – whereby the State actually casts abstention votes as "No" votes on an initiative measure. This vote counting scheme raises concerns not only about an individual's right to not vote, and therefore not to speak, but also the voters' right to have their vote weighed the same. Article III, section 52(f) of Wyoming's Constitution compromises

these fundamental constitutional principles as enunciated in this Honorable Court's precedents.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS**

**TENTH CIRCUIT**

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|---|---|---|
| JAMES P. BRADY, STEVEN O. RICHARDSON, JACK L. ADSIT a/k/a COMMITTEE OF SPONSORS OF CONGRESSIONAL TERM LIMITS REFORM 1996; JEREMY A. C. WEISSEL; STEPHANIE M. JACOBS; DEWEY C. HERNANDEZ, | ) | No. 97-8081 (D.C. No. 97-CV-016-D) (District of Wyoming) |
| Plaintiffs-Appellants, | ) | (Filed Jul. 15, 1998) |
| v. | ) | |
| DIANA J. OHMAN, Secretary of State, State of Wyoming, | ) | |
| Defendant-Appellee. | ) | |

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**ORDER AND JUDGMENT***

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Before **TACHA**, Circuit Judge, **KELLY,** Circuit Judge, and **McWILLIAMS,** Senior Circuit Judge.

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We are here concerned with the constitutionality of certain provisions of the Constitution for the State of

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Wyoming relating to initiative and referendum. A copy of Article 3, § 52 of the Wyoming Constitution is attached to this opinion. We are particularly concerned with the constitutionality of § 52(f), which provides, in part, that if the votes in favor of adoption of an initiated measure are in excess of 50% "of those voting in the general election," the measure is enacted. To a lesser degree, perhaps, we are also concerned with that part of § 52(f) which provides that if votes in an amount in excess of 50% "of those voting in the general election" are in favor of rejecting an act referred, the act referred is rejected.

In the 1996 general election in Wyoming there was on the ballot that which we shall refer to as Initiative # 1 and Referendum # 1. The purpose of Initiative # 1 was to encourage passage of an amendment to the United States Constitution setting term limits for members of the United States Congress. Referendum # 1 concerned term limits for certain elected state officials.

In the original complaint filed in the instant proceeding the plaintiffs were identified as follows: "James P. Brady, Steven O. Richardson and Jack L. Adsit a/k/a Committee of Sponsors of Congressional Term Limits Reform 1996." The one defendant was Diana J. Ohman, Secretary of State for the State of Wyoming ("Secretary"). The complaint was concerned only with Initiative # 1 and not Referendum # 1.

It was alleged in the complaint that at the general election in Wyoming in 1996, 105,093 votes were cast in favor of Initiative # 1 and 89,018 were cast against the measure, but that the Secretary, despite the fact that Initiative # 1 received a majority of the votes cast by

those voting on the measure, declared that Initiative # 1 did not pass because of § 52(f) of the Wyoming Constitution. According to the complaint, the Secretary interpreted § 52(f) to mean that in order for Initiative # 1 to be enacted it was necessary for the measure to receive a favorable vote "in an amount in excess of fifty per cent (50%) of those voting in the general election," which, in the 1996 general election would require a favorable vote of 107,923, whereas those voting in favor of Initiative # 1 were only 105,093. The plaintiffs pointed out in their complaint that § 52(f) was passed in 1968, and, as originally passed, provided that an initiated measure is enacted "[i]f votes in an amount in excess of fifty percent (50%) of those voting in the *preceding* general election are cast in favor of adoption of an initiated measure. . . . " (Emphasis ours.) In this regard the complaint noted that in 1986, § 52(f) was amended by deleting the word "preceding" from the original 1968 amendment and the plaintiffs asserted that the 1986 deletion of the one word – preceding – renders § 52(f) in violation of the United States Constitution. (In other words, § 52(f), as such appeared in the 1968 amendment, was not subject to any constitutional infirmity.)[1] The gist of the complaint was that the defendant by declaring that Initiative # 1 was not

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[1] Under § 52(f) as originally passed in 1968, an initiated measure had a better chance for getting voter approval if it were on the ballot in a presidential election than if it were on the ballot in an "off-year" non-presidential election, since more votes are always cast in a presidential election than in a non-presidential general election.

enacted violated plaintiffs' First and Fourteenth Amendment rights. By way of relief, plaintiffs sought a declaration that Initiative # 1 had passed and an order directing the Secretary to declare it so enacted.

In an amended complaint three other individuals were added as party plaintiffs. Each was identified as having voted in the 1996 general election but having "abstained from casting a vote on Initiative # 1." The amended complaint also added a challenge to the Secretary's action in connection with Referendum # 1 and indicated, but didn't say, that the additional plaintiffs had also abstained from voting on Referendum # 1. As concerns Referendum # 1, it was alleged that 104,544 were cast in favor of the referendum and 90,138 were cast against passage of the referendum. It was then alleged that the defendant's interpretation of § 52(f) was that in the case of a referendum, as in the case of any initiated measure, it was also not deemed to have been passed unless votes in excess of 50% of those voting in the general election (in our case 107,923 votes) were in favor of passage. Otherwise, the amended complaint basically paralleled the original complaint, i.e., plaintiffs' First and Fourteenth Amendment rights were violated by the Secretary's interpretation of § 52(f) of the Wyoming Constitution.

After an answer to the amended complaint was filed, both the plaintiffs and the Secretary filed motions for summary judgment, supported by briefs and affidavits. After hearing, the district court denied plaintiffs' motion and granted the Secretary's motion. Plaintiffs appeal the judgment entered. We affirm.

At the outset, we reject any suggestion that because the United States Constitution does not require the several states to provide for the initiative and referendum process, that a state, if it does so provide, may condition its use by impermissible restraints on First Amendment activity. Rather, it is apparently agreed, that if a state decides to afford its citizenry with the initiative and referendum process, it must do so in a manner consistent with the United States Constitution. *Meyer v. Grant*, 486 U.S. 414, 420 (1988), affirming our en banc opinion in *Grant v. Meyer*, 828 F.2d 1446 (10th Cir. 1987).

In *Burdick v. Takushi*, 504 U.S. 428, 432 (1992), the Supreme Court disavowed "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." In that connection the Court then went on to speak as follows:

> Instead, as the full Court agreed in *Anderson*, 460 U.S., at 788-789; *id.*, at 808, 817 (Rehnquist, J., dissenting), a more flexible standard applies. A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*, at 789; *Tashjian, supra*, at 213-214.
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth

> Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 289 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson*, 460 U.S., at 788; see also *id.*, at 788-789, n. 9. We apply this standard in considering petitioner's challenge to Hawaii's ban on write-in ballots.

*Id.* at 434.

In the district court, though not in this court, the plaintiffs suggested that the correct interpretation of § 52(f) was that, in order for an initiated measure to be enacted, it was only necessary that it receive a majority of the votes cast in connection with the initiated measure. Such an interpretation is in our view at odds with the plain language of § 52(f), which provides that "[i]f votes in an amount in excess of fifty percent (50%) *of those voting in the general election* are cast in favor of adoption of an initiated measure, the measure is enacted." (Emphasis ours.) Further, in *State ex rel. White v. Hathaway*, 478 P.2d 56 (Wyo. 1970), the Wyoming Supreme Court held that a provision of the Wyoming Constitution, calling for a "majority of electors" to ratify amendments thereto, required a majority of all electors to adopt the amendment and not merely a majority of those actually voting on the particular amendment under consideration, stating, specifically that "the word 'electors' meant 'the

number of electors who actually voted in the election'." *Id.* at 57. *See also Town of Pine Bluffs v. State Board of Equalization*, 79 Wyo. 262, 333 P.2d 700 (1958); *State ex rel. Blair v. Brooks*, 17 Wyo. 344, 99 P. 874 (1909).

On appeal, plaintiffs' only argument is that the provisions of § 52(f) which state that in order for an initiative measure to be enacted, it must receive a favorable vote in excess of 50% "of those voting in the general election," are unreasonable and violative of their First and Fourteenth Amendment rights. Specifically, in his brief, counsel states that "[t]he only issue for review . . . is whether the district court properly found that Article III, section 52(f) of the Wyoming Constitution does not violate the voting rights of the citizens of Wyoming as protected by the Equal Protection Clause and the First Amendment of the United States." In our view, the district court did not err in so holding.

Although there are a plethora of cases concerning "voting rights," our attention has not been drawn to any case involving a constitutional challenge to the voting requirements contained in § 52(f). In any event, we are not persuaded by counsel's primary argument in this court that, under § 52(f), the voter who abstains, for whatever reason, from voting on an initiated measure, is somehow deemed, by the state, to be voting "no" on the measure, and that such violates his right "not to vote." On the contrary, we believe the State of Wyoming has a legitimate and reasonable interest in seeing that an initiated measure, for example, is not enacted into law unless it is approved by a majority of those voting in the general election in which the initiated measure is being considered. If Wyoming wants to make it "harder," rather than

"easier," to make laws by the initiated process, such is its prerogative, and, in our view, does not violate the First Amendment. A state understandably wants to minimize abuse of the initiated process and make it difficult for a relatively small special interest group to enact its views into law through an initiated measure.

In granting the defendant's motion for summary judgment, the district court concluded that "the state and its citizens have an important if not compelling interest in assuring that the initiative or referendum is supported by more than the majority of those voting upon the particular initiative or referendum." We agree. In support of its conclusion, the district court relied on *Gordon v. Lance*, 403 U.S. 1 (1971), where the Supreme Court held that a West Virginia constitutional and statutory requirement that political subdivisions may not incur bonded indebtedness or increase tax rates beyond those established by the state constitution without the approval of 60% of the voters in a referendum election was constitutional.

The primary emphasis by the plaintiffs in this court relates to Initiative # 1. However, Referendum # 1 is also involved. § 52(f) provides that if votes in excess of 50% of those voting in a general election are cast in favor of rejection of an act referred, the act is rejected. That, however, is not our case. Votes in favor of rejection of the act referred were *less* than 50% of those voting in the general election. So, the referred act was not rejected. However, it was apparently the Secretary's understanding of Wyoming law that the referred act did not become law unless a majority of those voting in the general election favored the act referred. Whether that is a correct understanding of Wyoming law is not for us to decide. If

it is, such, in our view, does not offend the United States Constitution. We are advised that plaintiffs brought a separate action in the Wyoming courts challenging the Secretary's reading of § 52(f). We are not advised as to the outcome of that proceeding.

Judgment affirmed.

ENTERED FOR THE COURT

Robert H. McWilliams
Senior Circuit Judge

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ATTACHMENT

Initiative and Referendum

**§ 52. Initiative and referendum.**

(a) The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum.

(b) An initiative or referendum is proposed by an application containing the bill to be initiated or the act to be referred. The application shall be signed by not less than one hundred (100) qualified voters as sponsors, and shall be filed with the secretary of state. If he finds it in proper form he shall so certify. Denial of certificate shall be subject to judicial review.

(c) After certification of the application, a petition containing a summary of the subject matter shall be prepared by the secretary of state for circulation by the

sponsors. If signed by qualified voters, equal in number to fifteen per cent (15%) of those who voted in the preceding general election and resident in at least two-thirds (2/3) of the counties of the state, if[sic] may be filed with the secretary of state.

(d) An initiative petition may be filed at any time except that one may not be filed for a measure substantially the same as that defeated by an initiative election within the preceding (5) years. The secretary of state shall prepare a ballot title and proposition summarizing the proposed law, and shall place them on the ballot for the first statewide election held more than one hundred twenty (120) days after adjournment of the legislative session following the filing. If, before the election, substantially the same measure has been enacted, the petition is void.

(e) A referendum petition may be filed only within ninety (90) days after adjournment of the legislative session at which the act was passed, except that a referendum petition respecting any act previously passed by the legislature may be filed within six months after the power of referendum is adopted. The secretary of state shall prepare a ballot title and proposition summarizing the act and shall place them on the ballot for the first statewide election held more than one hundred eighty (180) days after adjournment of that session.

(f) If votes in an amount in excess of fifty percent (50%) of those voting in the general election are cast in favor of adoption of an initiated measure, the measure is enacted. If votes in an amount in excess of fifty percent (50%) of those voted[sic] in the general election are cast

in favor of rejection of an act referred, it is rejected. The secretary of state shall certify the election returns. An initiated law becomes effective ninety (90) days after certification, is not subject to veto, and may not be repealed by the legislature with two (2) years of its effective date. It may be amended at any time. An act rejected by referendum is void thirty (30) days after certification. Additional procedures for the initiative and referendum may be prescribed by law.

(g) The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, enact local or special legislation, or enact that prohibited by the constitution for enactment by the legislature. The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety. (As added by Laws 1967, Senate Joint Resolution No. 3, p. 729; as amended by Laws 1985, House Joint Resolution No. 3, p. 550.)

**United States District Court**

DISTRICT OF WYOMING

| | | |
|---|---|---|
| JAMES P. BRADY, ET AL<br>Plaintiff(s),<br><br>vs.<br><br>DIANA J. OHMAN,<br>SECRETARY OF STATE,<br>STATE OF WYOMING<br><br>Defendant(s). | ) | Case No. 97-CV-016-D |

JUDGMENT

Pursuant to the Court's Order Granting Defendant's Motion for Summary Judgment, a Judgment, as to all claims, is hereby entered in favor of Defendant and against Plaintiffs, each party bear their own fees and costs.

Dated this 15th day of July, 1997

/s/ Betty A. Griess
Betty A. Griess,
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

| | | |
|---|---|---|
| JAMES P. BRADY, STEVEN O. RICHARDSON, JACK L. ADSIT a/k/a COMMITTEE OF SPONSORS OF CONGRESSIONAL TERM LIMITS REFORM 1996; and JEREMY A.C. WEISSEL, STEPHANIE M. JACOBS and DEWEY C. HERNANDEZ, | ) | CIVIL NO. 97-cv-0016-D |
| Plaintiffs, | ) | |
| vs. | ) | |
| DIANA J. OHMAN, Secretary of State, State of Wyoming, | ) | |
| Defendant. | ) | |

TRANSCRIPT OF TELEPHONIC ORAL RULING
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

PROCEEDINGS had telephonically before the Honorable William F. Downes, United States District Judge for the District of Wyoming, on the 9th day of July, 1997, at the U.S. District Courthouse, Casper, Wyoming.

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[p. 3] THE COURT: Good morning, counsel. This is Judge Downes. As you can probably tell, I'm – I'm a bit under the weather today, and I just came from the doctor's office. So if you'll give me a few minutes, I'll be with you shortly.

MR. SWEDLUND: Okay.

THE COURT: Thank you.

(An off-the-record discussion was had by the Court and law clerk.)

THE COURT: Thank you, for your patience, counsel. Hopefully my voice will hold out. Can everybody hear me?

MR. SWEDLUND: I can, sure.

MS. HECKERT: Yes, I can, Your Honor.

THE COURT: This is the Court's ruling on cross-motions for summary judgment in the case of Brady et al., versus Secretary of State, 97-CV-016-D.

The Court, having reviewed the materials filed in support and opposition to the respective motions, having listened carefully to oral argument and being otherwise advised, finds as follows:

First the factual background: This suit arises out of the most recent battle over Initiative Number 1 and Referendum Number 1 that appeared on a ballot of the 1996 Wyoming general election. Both the initiative and referendum dealt with the issue of term limits. Initiative [p. 4] Number 1 sought to encourage passage of an amendment to the United States Constitution setting term limits for members of congress. Referendum Number 1 sought to impose term limits for certain elected state officials.

During the 1996 general election, a total of 215,844 voters cast votes in the general election. Initiative Number 1 received 105,093 votes in favor of passage and 89,018 against.

Referendum Number 1 received 104,550- – I'm sorry – -544 votes in favor of passage and 90,138 against.

Pursuant to Article 3, Section 52(f), of the Wyoming Constitution, defendant declared that both Initiative Number 1 and Referendum Number 1, having failed to receive a majority of the votes cast in the general election, failed to pass.

Article 3, 52(f), of the Wyoming Constitution provides in pertinent parts, quote: If votes in an amount in

excess of 50 percent of those voting in the general election are – are – one moment, please.

I had the wrong language in the statutory provision. So let me say it again. Again, now quoting the pertinent parts of Subparagraph (f): If votes in an amount in excess of 50 percent of those voting in the general election are cast in favor of adoption of an initiative measure, the measure is enacted, close quote.

[p. 5] Plaintiffs include two groups of individuals: One consisting of the group who formed the committee of sponsorship for the initiative and referendum and who voted in favor of Initiative Number 1 and Referendum Number 1; the second group consists of those individuals who abstained from voting on Initiative Number 1 and Referendum Number 1.

Plaintiffs' complaint asserts that the defendant's interpretation of 52(f) of the Wyoming Constitution violates plaintiffs' rights to free expression and equal protection of the laws. Plaintiff further contends that 52(f) must be interpreted as requiring only a majority of the votes cast in favor of or against Initiative and Referendum Number 1.

In the alternative plaintiff contends that 52(f) is unconstitutional to the extent it requires a majority of votes cast in the general election and must be read as requiring only a majority of votes cast in the preceding general election. Under such interpretation both the initiative and referendum would have passed.

The court will briefly state the standard of review. The standard of review on a motion for summary judgment is well established. Quote, by its very terms the standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. The requirement is that there is no genuine issue of [p. 6] material fact, close quote. *Anderson versus Liberty Lobby, Inc.*, 477 U.S. 242, 247 and 48, 1986.

The trial court determines which facts are material as matter of law. Quote, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment, close quote. *Id.* at 248. See also *Carey versus United States Postal Service*, 812 F.2d 621, 623, Tenth Circuit 1987.

Summary judgment may be entered "against a – and this is part of a quote – against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof, close quote. *Celotex Corporation versus Catrett*, 477 U.S. 317, 322, 1986; *Carey*, 812 F.2d at 623.

The appropriate inquiry is, quote, whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law, close quote. *Carey*, 812 F.2d at 623.

Quote, where the record taken as a whole could not lead a rational trier of the fact to find for the non-moving party, there is no genuine issue for trial, close quote. *Matsushita Electric Industries versus Zenith Radio* [p. 7]

*Corporation,* 475 U.S. 574, 586 1986. In considering a party's motion for summary judgment, the Court must examine all evidence in the light most favorable to the non-moving party. *Moya versus U.S.,* 35 F.3d 501, 503, Tenth Circuit 1994.

The Court will briefly address standing. Defendant asserts that those plaintiffs who abstained from voting on the initiative and referendum lack standing to assert any claims. For the purposes of these motions only and to ensure a complete record, the Court will assume that all plaintiffs have standing to bring this lawsuit.

As a preliminary matter this Court must determine the scrutiny under which it must assess the requirement under Article 3, Section 53(f).

In *Burdick versus Takushi,* 40 – 504 U.S. 428, 1992, the Supreme Court observed that, quote, the voting process itself inevitably affects, at least to some degree, the individual's right to vote and his right to associate with others for political ends, close quote. *Id.* at 433; parentheses, citing with approval *Anderson versus Celebrezze,* 460, U.S. 780, 788, 1983, close paren.

As a result, the Court concluded that not every regulation on voting was subject to strict scrutiny. Instead the Court held that, quote, a Court, considering a challenge to a state election law, must weigh – and this is [p. 8] a quote within a quote – 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiffs seek to vindicate,' close – this is the close of the quote within the quote – against – another quote within a quote – the precise interests put forward by the state as justifications for the

burden imposed by its rule, close quote, taking into consideration, quote, the extent to which those interests make it necessary to burden the plaintiffs' rights, close quote. *Anderson*, supra, at 789; *Tashjian versus Republican Party of Connecticut*, 479 U.S. 208, 213, 214.

Now, continuing the quote – I'm giving you all the citations in the quote, counsel. Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.

Thus, as we have recognized, when those rights are subjected to severe restrictions, the regulation must be, quote, narrowly drawn to advance a state interest of compelling importance, close quote. *Norman v. Reed*, 502 U.S. 279, 289, 1992. But when a state election law provision imposes only, quote, reasonable, non-discriminatory restrictions, close quote, upon the First and Fourteenth Amendment rights of voters, quote, the [p. 9] state's important regulatory interests are generally sufficient to justify, close quote, the restrictions. *Anderson*, 460 U.S. at 788. See also *Id.* at 788, 789, Note 9. And that's the end of the – the quote.

As in *Burdick*, the Court finds that the requirements under Article 3, Section 52(f), of the Wyoming Constitution imposes reasonable, non-discriminatory restrictions upon First and Fourteenth Amendment rights, and Wyoming's important regulatory interests are generally sufficient to justify the restriction.

Here, based upon the impact an initiative or referendum can have, i.e., allowing citizens to directly write and

pass laws or reject acts of the legislature affecting all of the citizens of Wyoming, coupled with the ease by which an initiative or referendum is placed upon a ballot, the state and its citizens have an important if not compelling interest in assuring that the initiative or referendum is supported by more than the majority of those voting upon the particular initiative or referendum. The state's and citizens' interest is further heightened by the limitations on repeal or veto of an initiative or referendum once passed.

Now looking directly at Article 3, Section 52(f): Plaintiffs assert that the defendant's interpretation of 52(f) requiring that in order to pass an initiative or [p. 10] referendum must receive in excess of 50 percent of the total number of votes cast in the general election is incorrect. The Court disagrees.

The rules of construction are well established. When the language at issue is unambiguous, the plain language controls unless it would produce a result at odds with the intentions of the drafters. See *Ute Distribution Corporation versus United States*, 938 F.2d, 1157, 1162, Tenth Circuit 1991.

It is also well established that ordinary words are given their ordinary meaning. This Court finds that the language of Article 3, Section 52(f), is clear and unambiguous. As such, in order to gain passage, an initiated measure must receive, quote, votes in an amount in excess of 50 percent of those voting in the general election, close quote. Underline those words "of those voting in the general election."

In an effort to create ambiguity, plaintiffs attempt to read, quote, those voting, close quote, without reference to the words, quote, in the general election, close quote. When read together these words are not ambiguous.

Finally, for the reasons set forth below, it is not necessary to interpret 52(f) in such a way as to avoid any unconstitutionality. With respect to the equal [p. 11] protection claims, plaintiff appears to have abandoned this claim. To the extent they have not abandoned the claim, the Court finds that the plaintiffs have failed to establish or articulate an equal protection claim.

The requirements under 52(f) apply to all and do not discriminate against or authorize discrimination against any identifiable class. See *Gordon v. Lance*, 403 U.S. 1, 7, 1971. Accordingly, the defendant is entitled to summary judgment on this claim.

With respect to the First Amendment claims, plaintiffs assert that requiring an initiative to receive in excess of 50 percent of the votes cast in the general election results in a voter who voted in the general election but did not cast a vote on the initiative having his or her abstention – allowing his or her abstention vote on the referendum impermissibly count as a "no" vote on the initiative.

At the heart of the plaintiffs' claim is that 52(f), quote, compels the abstention plaintiffs to utter what is not in their minds: A position or an initiated or referred measure – on an initiated or referred measure, close quote. See plaintiffs' reply brief at 11.

In making this argument, plaintiffs seek to extend the principle recognized in *West Virginia State Board of Education versus Barnette,* 319 U.S. 623, 1943, that a person [p. 12] cannot be compelled to publicly declare a belief. This Court rejects the plaintiffs' argument.

Unlike *Barnette* or even *Wooley v. Maynard,* 420 U.S. 705, 714, 1977, the plaintiff in this – the plaintiffs in this case are not being compelled to publicly – and I underline the word "publicly" – display or profess their allegiance, opinion or vote. Plaintiffs are the only ones who know whether they voted or not and which way they voted.

Neither do the requirements under 52(f) create an impediment on plaintiffs' freedom of religion as was the case in *Barnette.*

The case law relied upon by plaintiffs simply does not support their argument in this case. Furthermore, this Court is unable to find any case law which appears to support the plaintiffs' argument. The only case law even remotely on point suggests that the requirements under 52(f) are not violative of any constitutional provisions. See *Gordon v. Lance,* 403 U.S. I, 7 and 8, 1971.

In *Gordon,* the Supreme Court found constitutional a requirement under the West Virginia constitution that required a 60 percent approval of the voters in a referendum election before any political subdivision could incur bonded indebtedness or increase tax rates. After finding that the requirement was constitutional, the Court noted that in various situations more than a simple majority is required, [p. 13] stating, quote: We see no constitutional distinction between the 60 percent requirement in the present case and a state requirement that a given issue be

approved by a majority of all registered voters. Citations omitted.

That West Virginia has adopted a rule of decision, applicable to all bond referenda, by which the strong consensus of three-fifths is required before indebtedness is authorized, does not violate the equal protection clause or any other provision of the constitution, close quote. *Id.* at 7 and 8.

Accordingly, this Court finds that the requirements under Section 52(f) do not violate the plaintiffs' First Amendment rights; and as a matter of law the defendant, the State of Wyoming, is entitled to a judgment in its favor.

Therefore, it is ordered that the defendant's motion for summary judgment is hereby granted as to all claims, each party to bear their own fees and costs.

It is further ordered that the plaintiffs' motion for summary judgment against the defendant Secretary of State is hereby denied. So ordered.

Counsel, if any party would like to obtain a transcript of the Court's oral ruling which will be incorporated by reference in a one-page order granting and denying summary judgment which will issue from the Court [p. 14] today, you may stay on the line and obtain a copy of that transcript from my court reporter. Thank you and good morning.

MR. SWEDLUND: Thank you, Your Honor.

MS. HECKERT: Thank you, Your Honor.

**(END OF PROCEEDINGS)**

* * *

REPORTER CERTIFICATE

I, **JAMIE L. HENDRICH,** Official Court Reporter in the United States District Court for the District of Wyoming, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth.

/s/ Jamie L. Hendrich
**JAMIE L. HENDRICH, CSR, RPR, CRR**
Federal Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

| | | |
|---|---|---|
| JAMES P. BRADY, et al.,<br>Plaintiffs,<br>v.<br>DIANA J. OHMAN, SECRETARY OF STATE, STATE OF WYOMING<br>Defendant. | ) | Civil Action<br>No. 97-CV-016-D |

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
(Filed Jul. 14, 1997)

Pursuant to the Court's findings as stated orally on the record, and incorporated herein by reference in open Court on July 9, 1997, it is hereby

**ORDERED,** that Defendant's Motion for Summary Judgment is hereby **GRANTED,** each party to bear their own fees and costs. It is further

**ORDERED,** that Plaintiffs' Motion for Summary Judgment is hereby **DENIED.**

DATED this 12th day of July, 1997.

/s/ William F. Downes
United States District Judge

(2)

No. 98-625

FILED
NOV 12 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

# Supreme Court of the United States

**October Term, 1998**

JAMES P. BRADY, STEVEN O. RICHARDSON, JACK L. ADSIT a/k/a COMMITTEE OF SPONSORS OF CONGRESSIONAL TERM LIMITS REFORM 1996, and JEREMY A.C. WEISSEL, STEPHANIE M. JACOBS, and DEWEY C. HERNANDEZ,

*Petitioners,*

v.

DIANA J. OHMAN, SECRETARY OF STATE FOR THE STATE OF WYOMING,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Does WYO. CONST. art. 3, § 52(f) of the Wyoming Constitution violate the First Amendment of the United States Constitution where its terms require a favorable vote of a majority of all people voting in the election in order to enact an initiative or repeal an existing law?

## LIST OF ALL PARTIES TO THE PROCEEDING

a. Respondent

Diana Ohman, Secretary of State, State of Wyoming

b. Petitioners

James P. Brady, Steven O. Richardson, Jack L. Adsit, a/k/a Committee of Sponsors of Congressional Term Limits Reform 1996 and Jeremy A.C. Weissel, Stephanie M. Jacobs and Dewey C. Hernandez

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## CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS BELOW BY COURTS AND ADMINISTRATIVE AGENCIES

a. Order and Judgment of the United States Court of Appeals for the Tenth Circuit; unpublished, *Brady, et al. v. Ohman*, 153 F. 3d 726, 1998 WL 438789 (10th Cir. Wyo. 1998)

b. Order and Judgment of the United States District Court for the District of Wyoming; unpublished, *James P. Brady et al. v. Ohman*, No. 97-CV-016-D (D. Wyo. July 9, 1997).

## STATEMENT OF JURISDICTIONAL BASIS

28 U.S.C. § 1254(1) provides that cases in the courts of appeals may be reviewed by the Supreme Court where a writ of certiorari is granted. The Tenth Circuit Court of Appeals entered its Order and Judgment on July 15, 1998.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

WYO. CONST. art. 3, § 52(f)

If votes in an amount in excess of fifty percent (50%) of those voting in the general election are cast in favor of adoption of an initiated measure, the measure is enacted. If votes in an amount in excess of fifty percent (50%) of those voted in the general election are cast in favor of rejection of an act referred, it is rejected. The secretary of

state shall certify the election returns. An initiated law becomes effective ninety (90) days after certification, is not subject to veto, and may not be repealed by the legislature within two (2) years of its effective date. It may be amended at any time. An act rejected by referendum is void thirty (30) days after certification. Additional procedures for the initiative and referendum may be prescribed by law.

## STATEMENT OF THE CASE

Respondents adopt the Petitioners' Procedural History and Basis of Jurisdiction, and the Petitioners' Appendix.

### a. FACTS

The original Plaintiffs supported both an initiative and a referendum which appeared on the 1996 general election ballot in Wyoming. The initiative and the referendum each garnered a majority of the favorable votes cast on each proposition but not a majority of all the votes cast in the general election. As a result both measures failed under WYO. CONST. art. 3, § 52(f). The count of favorable votes did not reach a majority of all the votes cast in the election. There was a count of "yes" votes and a count of the total votes case in the election. These two figures were then compared, as is required by WYO. CONST. art. 3, § 52(f). Petitioners claim that this method "compels" them to speak in violation of the First Amendment.

## ARGUMENT

There is no cogent authority cited for the Petitioners' assertion that counting the total number of votes, for comparison and determination of passage, is "casting" a vote for the abstainer. On the contrary, this method for calculating the passage of an item has been found constitutional by the Wyoming Supreme Court in *State ex rel. White v. Hathaway*, 478 P.2d 56 (Wyo. 1970). The State of Wyoming has a compelling state interest in assuring that an initiative or referendum is supported by more than a majority of those casting a vote on the particular initiative or referendum issue and has created a constitutionally sound method for assuring that the initiative should be passed. Such "supermajority" methods have been found constitutional. *Gordon v. Lance*, 403 U.S. 1, 91 S.Ct. 1889, 29 L.Ed.2d 273 (1971).

Section 52(f) does not take away the right to *not* vote. Voters can choose not to vote. If they choose not to vote on a particular issue there is a consequence to that decision that is created by law. That consequence, in the context of passage of an initiative, is this: by not voting one leaves it to other voters *and to the mechanism prescribed by the Wyoming Constitution* to determine the outcome that flows from exercising that choice. Section 52(f) contains absolutely no language about characterizing abstentions as a "yes" or a "no" or even a "maybe." It simply details that the affirmative votes be compared against the total number of votes cast in the election. "Yes" votes are counted and a comparison is then made after the total count is determined. Once the total is determined, the Secretary of State's office determines the number for the threshold amount to constitute a majority of the total

votes cast. That number settles whether the issue is passed or not passed. That is exactly what happened in this case.

The egregious example given by Petitioners in their Petition for Certorari as follows:

> "If 100,000 people vote in a general election, and only 50,000 people actually vote on the proposed measure by marking 'Yes' on the ballot, the measure still fails because the 50,000 voters who abstained from voting on the measure are deemed by Wyoming as having voted 'No.'"

This is a misstatement of fact. There is no "deeming" of any vote. There is no ascription of a nonvoting ballot on this issue as being a "no" vote or an "abstention" vote. There is a tally of the "Yes" votes, the "No" votes and a tally of the total number of votes. To state that a tally or count of abstentions is made simply misstates the facts so that Petitioners can make a First Amendment argument. Quite simply, there is no tally of "abstention" votes. There is no deeming of a vote and there can be no "compelling" of speech therefore.

Petitioners assert that the act of abstention, of acquiescence, would become a "voice" in defiance of the very position that they rail against. Clearly, where there is no act by state government there can be nothing which compels speech. The act of acquiescence in voting on a particular issue, the act of abstaining for whatever reason is a voluntary act on the part of the voter. There is no voice given to that act. To say that logical consequences which flow from an act of acquiescence "compels" speech is a conceptual leap, at minimum, and the argument of the Petitioners must fail as a result. The trial court agreed.

The 10th Circuit Court of Appeals did, as well. This is not an argument that should be given credence by a grant of Certiorari.

## CONCLUSION

The decision of the Tenth Circuit Court of Appeals, affirming the Judgment of the District Court, should stand. The Petition for Certorari should be denied.

Respectfully submitted,

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